88-1699

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS P. CULLEN,

Petitioner,

vs.

PAINE, WEBBER, JACKSON & CURTIS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. In the absence of case law from this Circuit, whether the Appellate Court erred in finding that an arbitration award may not be challenged by timely opposition to a motion to confirm an arbitration award after 90 days from the date of the award?

2. Whether the Appellate Court erred in finding that Petitioner did not show he acted with due diligence even though he pursued good-faith settlement negotiations which extended beyond 90 days from the date of the award and timely filed his opposition to the motion to confirm?

3. Whether the Appellate Court erred in precluding Petitioner's affirmative defenses to the motion to confirm award where allowing such affirmative defenses could not prejudice Respondent because Petitioner gave Respondent written notice of his reserved challenge to the award when settlement discussions commenced only two weeks from the date of the arbitration award?

PARTIES

The petitioner is Thomas P. Cullen.

The respondent is Paine, Webber, Jackson & Curtis, Inc.

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* Asterisk indicates authorities chiefly relied upon by Appellant.

DECISION BELOW

The United States District Court Northern District of Georgia, Atlanta Division, had jurisdiction over the parties and the matters before the Court on Respondent's motion for confirmation of an arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. The District Court filed a final order confirming the arbitration award and denying Petitioner's cross-motion to vacate on April 6, 1988. The Clerk by order of the Court entered final judgment in favor of Respondent on April 7, 1988.

Petitioner appealed from the final order of the District Court and the entry of final judgment against Petitioner. The United States Court of Appeals for the Eleventh Circuit had jurisdiction over the parties and the matters before the Court and affirmed the judgment rendered by the District Court. Judgment was entered on January 17, 1989.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the District Court was entered on January 17, 1989. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

See Appendix.

STATEMENT OF THE CASE

A. *Course of Proceedings and Statement of the Facts*

The case is before the Court on the appeal by Petitioner Thomas P. Cullen of the Order entered by the United States District Court for the Northern District of Georgia Atlanta Division precluding his affirmative defenses to Respondent's motion to confirm arbitration award which was granted by the District Court.

The original action was stayed on June 26, 1984 pending an arbitration hearing. An arbitration award for the defendant was entered on June 24, 1987 (Appendix). Two weeks after the award, Petitioner reserved on his challenge to the arbitration award in writing to Respondent and presented a settlement proposal to avoid the burden of further litigation. More than 90 days after the date of the arbitration award, on October 19, 1987, without prior notice to Petitioner, Respondent unilaterally rejected Petitioner's settlement proposal. Respondent Paine Webber, Inc. filed a motion to confirm the arbitration decision on November 20, 1987. On December 9, 1987, plaintiff responded by serving a timely opposition and cross-motion to vacate that award.

Petitioner Thomas P. Cullen opposed the confirmation of this arbitration award as a judgment of this court because the arbitrators showed bias against Mr. Cullen and his attorney, prejudiced Mr. Cullen, and denied Mr. Cullen due process of law and a fair arbitration.

The District Court precluded these affirmative defenses and granted Respondent's motion to confirm on April 6, 1988. Thereafter Mr. Cullen appealed to the U.S. Court of Appeals for the Eleventh Circuit. The case was one of first impression for the Eleventh Circuit. The court chose to follow a New York appellate case which reversed earlier district court cases and which is in conflict with another appellate court case, and entered judgment affirming the District Court decision against Mr. Cullen.

B. *Statement of the Standard of Review*

In the absence of any previous case law from the Eleventh Circuit, the District Court and Appellate Court erred in formulating new law which unfairly and unreasonably limits the right of a non-moving party to oppose a motion to confirm an arbitration award. Both courts precluded all of Mr. Cullen's affirmative defenses without any consideration given them. Both courts also erred in applying Section 12 of the Arbitration Act to preclude Mr. Cullen's defenses permitted by Section 9, 10 and 11 of the Act, which Sections do not impose any such limits on timely oppositions to motions to confirm awards. Both courts further erred in finding that Mr. Cullen did not show that he acted with due diligence.

SUMMARY OF ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Both the District and Appellate Courts erred in precluding Petitioner's defenses to Respondent's motion to confirm the arbitration award. Because the Courts so erred, the award by the arbitration panel in favor of Respondent should not have been confirmed. The District Court never even reached the merits of Petitioners showing that the arbitration panel showed bias toward the Petitioner and his counsel, totally ignored his counterclaims, and denied him discovery which had been ordered by the New York Stock Exchange (NYSE) as necessary to the presentation of his case.

The Appellate Court erred in formulating a new law which unfairly and unreasonably limits the right of a non-moving party to oppose a motion to confirm an arbitration award. Although different courts have interpreted the provisions of the Arbitration Act differently, affirmative defenses may be rasied in opposition to a motion to confirm an award and even a motion to vacate an award may be filed more than 90 days from the date of an award if it is responsive to a motion to confirm, rather than be filed as an independent motion.

Also, contrary to a finding of both the District and Appellate courts, Petitioner did show that he acted with due diligence in pursuing good-faith settlement negotiations as an alternative to further litigation. Respondent unilaterally terminated settlement discussions without notice more than 90 days after the award and moved to confirm the award. With due diligence, Petitioner timely filed his opposition raising affirmative defenses to the motion and a cross-motion to vacate the award.

Moreover, the Court's consideration of Petitioner's affirmative defenses to Respondent's motion to confirm could not prejudice Respondent because Petitioner gave Respondent written notice of his reserved challenge to the award when settlement discussions commenced only two weeks from the date of the arbitration award.

Furthermore, this Court has recently held in *Shearson, American Express, Inc. v. McMahon*, ____ U.S. ____, 96 L.Ed.2d 185, 107 S.Ct. 2332 (1987), that agreements to arbitration within a contract are binding. In light of *McMahon*, the flood gates to resolution by arbitration have been opened and guidance is needed in that area as to the guidelines which must be followed by arbitrators and the various interpretations of the statutes of limitations under section 12 of the Arbitration Act.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The decisions of the District Court and the Court of Appeals erred in finding that an arbitration award may not be challenged by timely opposition to a motion to confirm an arbitration award after 90 days from the date of the award.

Petitioner's affirmative defenses to Respondent's motion to confirm under Section 10 and 11 of the Arbitration Act should not have been precluded by the District Court. Under Section 9 of the Act, a motion to confirm is subject to Sections 10 and 11 which empower a court to vacate, modify, or correct an award. Once a party has moved to confirm an award, the other party is free to oppose the motion, whether or not the time period

for vacating the award has expired. *See* Domke, *Commericial Arbitration*, Sec. 35:01. *Paul Allison v. Minikin Storage of Omaha, Inc.*, 542 F.Supp. 575 (D. Neb. 1978).

An arbitration award may be vacated and a rehearing directed by the District Court under the provision of the Arbitration Act, 9 U.S.C.A. § 10.* Title 9, § 10 provides in pertinent part as follows:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceed their power, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

In addition, regardless of the time expired, a motion to confirm an award can be followed by a defensive motion to vacate. *Paul Allison v. Minikin Storage of Omaha, Inc., supra*; *Riko*

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* An arbitration award may also be modified or corrected under 9 U.S.C.A. § 11.

Enterprises, Inc. v. Seattle Supersonics Corp., 357 F.Supp. 521 (S.D.N.Y. 1973). It is defendant's motion to confirm which makes plaintiff's motion to vacate a proper response rather than just an independent motion. Despite the new interpretation of the Arbitration Act given by the Second and Fourth Circuits in *Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2nd Cir. 1984) and *Taylor v. Nelson*, 788 F.2d 220 (4th Cir. 1986), Sections 9, 10 and 11 of the Arbitration Act permit an opposition to a motion to confirm an arbitration award.

The Appellate Court below erred in imposing the 90 day time limitation of Section 12 on Appellant's right to oppose a motion to confirm under Sections 9, 10 and 11 of the Arbitration Act. Since Appellant raised affirmative defenses to Appellee's motion to confirm in an opposition to the motion in addition to filing a defensive cross-motion to vacate, such defenses are proper and timely under Sections 9, 10 and 11 of the Act, which provisions are independent of Section 12.

Moreover, the New York law upon which the federal act is based permits a party to oppose a motion to confirm even after three months have passed. *Florasynth, Inc. v. Pickholz, supra*, at 176. The parties to this action have agreed that New York law shall apply. *See Cullen v. Paine Webber, Jackson & Curtis, Inc.*, 587 F.Supp. 1520 (N.D. Ga. 1984). Therefore, Petitioner is entitled to oppose Respondent's motion to confirm.

With respect to Petitioner's cross motion to vacate, Respondent Paine Webber provided plaintiff with the very means by which it can still raise objections by a cross-motion to vacate, otherwise barred by Section 12 of the Act. *See Riko Enterprises, Inc. v. Seattle Supersonics Corp., supra* at 523. As in *Riko*, Petitioner's motion is not an independent motion to vacate, but a proper response to Respondent's motion to confirm arbitration decision.

The Appellate Court's application of the Arbitration Act is essentially based upon a changed interpretation of Section 12 of the act given by the Second Circuit Court of Appeals in *Florasynth, Inc. v. Pickholz, supra*, at 177, which is followed

by *Taylor v. Nelson*, *supra* at 225. In *Taylor*, the court adopted the new interpretation by the Second Circuit which attempts to distinguish the federal act from the New York State legislation upon which it is based. *See Florasynth*, *supra*, at 175. In *Taylor*, such interpretation assumes that the moving party would be prejudiced without a confirmation of the award after 90 days since the "successful party has a right to assume the award is valid and untainted . . ." *Id.* at 177. Thus, *Florasynth* and *Taylor* are distinguishable from the case at bar because Respondent Paine Webber voluntarily chose to enter into settlement discussions with Petitioner Cullen with full notice that Petitioner had given his counsel authorization to otherwise pursue an appeal of the award. Therefore, there could be no prejudice to Respondent in allowing Petitioner Cullen to raise his affirmative defenses in opposition since Respondent unilaterally ended settlement discussions more than 90 days after the award and moved to confirm the award.

Moreover, the Appellate Court below erred in finding that the Second Circuit in *Florasynth* overruled *Riko*. In *Florasynth*, the Second Circuit only explained *The Hartbridge*, 57 F.2d 672, 673 (2nd Cir. 1932), *cert. denied sub nom., Munson Steamship Line v. North England Steamship Co.*, 288 U.S. 601 (1933), without overruling its earlier decision. The District Court in *Riko*, favorably cited *The Hartbridge*, quoting:

> Upon a motion to confirm the party opposing confirmation may apparently object upon any ground which constitutes a sufficient cause under the statute to vacate . . . although no such formal motion has been made.
>
> * * *
>
> Although more than three months have elapsed since the award was filed, the appellant may still assert objections to confirmation of the award. There is authority for the proposition that even after the statutory period for moving to vacate an award has

> expired, a party may use the statutory grounds for vacation in defense of a motion to confirm.

Id. at 672, 673.

Also, in *Florasynth*, Appellant Pickholz sat for four months doing nothing, whereas in the case at bar Petitioner Cullen diligently attempted to settle the matter without the further burden of litigation on the Court and the parties. Notwithstanding its ruling relative to Section 12, the Second Circuit in *Florasynth* did recognize that a party may vacate an arbitration award when "there was evident partiality or corruption in the arbitrators or either of them." 9 U.S.C. § 10(b). In the present case, the Appellate Court failed to even consider Petitioner's showing of bias and unfairness on the part of the arbitrators and the prejudice to Petitioner's right to due process. The record shows that Respondent's award was an unjust result of tainted arbitration proceedings.

Petitioner Cullen has shown that the arbitrators did not permit him a full and fair defense to Respondent Paine Webber's claims at the arbitration proceeding, and that they did not permit him a fair hearing on his countercalims against Paine Webber. The arbitrators forced Mr. Cullen to proceed with the hearings on June 23 and 24, 1987, even though defendant Paine Webber failed to produce its records as required pursuant to a valid subpoena issued by the NYSE. At the same time, Paine Webber did not produce adequate evidence to support its claims against Mr. Cullen. Also, without Paine Webber's records, Mr. Cullen did not have the full opportunity to present his case and examine Paine Webber's witnesses. Moreover, during the arbitration hearing, the Chairman of the arbitration panel showed an outspoken bias on the record against Mr. Cullen and his counsel. In addition, the arbitrators arbitrarily and capriciously ignored Mr. Cullen's counterclaims against Paine Webber.

The arbitrators' conduct showed partiality and constituted misconduct which prejudiced Mr. Cullen's rights to a fair arbitration in violation of §§ 10(b-d) of the Arbitration Act. Because the arbitration was prejudicial and unfair to Petitioner

Cullen, the arbitration award should not have been confirmed, but rather should have been vacated and a rehearing directed by the Appellate Court.

II. The Appellate Court erred in finding that Petitioner did not show he acted with due diligence even though he pursued good-faith settlement negotiations which extended beyond 90 days from the date of the award and timely filed his opposition to motion to confirm.

Assuming *arguendo* that this Court follows *Taylor* and *Florasynth*, courts may yet recognize a due diligence exception as noted in *Taylor, supra*, at 225. The Appellate Court noted that some courts have considered the possibility that a due diligence exception to Section 12 might be granted in some circumstances. The mere fact that no cases have yet turned on such a determination does not bar the court from so deciding that due diligence has been met in the case at bar. In the present case, the parties were engaged in settlement discussions beyond the arguable 90 day limit of Section 12. Petitioner acted with due diligence in pursuing good faith settlement discussions, while reserving his challenge to the arbitration award. After 90 days from the date of the award, Respondent Paine Webber terminated such discussions without prior notice on October 19, 1987. Petitioner then moved to confirm the award and with due diligence Petitioner responded to Respondent Paine Webber's motion by opposing the motion and cross-moving to vacate the award.

The Appellate Court erred in finding that Petitioner did not show due diligence. Furthermore, the lower court failed to understand that Petitioner's alternate pursuit of settlement was a good-faith effort to avoid a burden of further litigation on the parties and the courts.

III. The Appellate Court erred in precluding Petitioner's affirmative defenses to the motion to confirm the award where allowing such affirmative defenses could not prejudice Respondent because Petitioner gave Respondent written notice of his reserved challenge to the award when settlement discussions commenced only two weeks from the date of the arbitration award.

Respondent could not be prejudiced by Petitioner later raising his affirmative defenses in reponse to a motion to confirm because Petitioner notified Respondent in writing of his reserved challenged to the award at the time he presented his settlement proposal to Respondent. Instead, the Appellate Court erred in prejudicing Petitioner by precluding his affirmative defenses to the motion to confirm the award.

IV. The *Shearson, American Express, Inc. v. McMahon* decision has opened the floodgates to dispute resolution through arbitration thereby necessitating guidance on the duties of arbitrators and the various interpretations of the section 12 statute of limitations.

This Court should grant certiorari on this issue to avoid confusion and to provide more extensive guidelines regarding the duties of arbitrators and the interpretations on the statute of limitations provisions attributed to section 12 of the Arbitration Act. The *Shearson, American Express, Inc. v. McMahon*, ____ U.S. ____, 96 L.Ed.2d 185, 107 S.Ct. 2332 (1987) decision held that agreements to arbitration within contracts are binding. Pursuant to *McMahon*, more and more disputes will be directed to arbitration, as was Mr. Cullen's. More complete case law on the subject could only better the arbitration process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant this writ of certiorari in order to review the decision of the United States Court of appeals for the Eleventh Circuit.

Respectfully submitted,

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Dated: April 17, 1989

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Thomas P. CULLEN, Plaintiff

v.

PAINE, WEBBER, JACKSON
& CURTIS, INC., Defendant
Civ. A. No. C84-502A.

United States District Court
Northern District of Georgia
Atlanta Division

June 26, 1984

General securities representative brought action agianst employer, and, following removal from state court, employer moved to stay the action pending arbitration. The District Court, Robert H. Hall, J., held that: (1) constitution rules of New York Stock Exchange created binding agreement between the parties to arbitrate the dispute; (2) dispute was arbitrable where it involved promissory note apparently escecuted in connection with employment; and (3) employer did not waive its right to compel arbitration by agreeing to have the note governed and construed in accordance with New York law.

Motion granted.

1. Exhcnages 11(12)

Principles of Federal Arbitration Act were applicable to employment contract establishing employment relationship concerning securities. 9 U.S.C.A. § 1 et seq.

2. Arbitration 1.1

Arbitration is matter of contract and party cannot be required to submit dispute to arbitration unless he or she has agreed to do so.

3. Exchanges 11(12)

Constitution and rules of New York Stock Exchange created binding agreement to arbitrate between general securites representative and his employer where the constitution and rules constituted agreement betweeen exchange and representative as well as agreement between exchange and his employer and, by their terms, between representative and his employer despite absence of any express agreement to arbitrate made directly between them.

4. Exchanges 11(12)

Dispute between general securities representative and his employer over promissory note was arbitrable under agreement requiring arbitration of any controversy pertaining to employment where the note was apparently executed in connection with the employment relationship.

5. Exchanges 11(12)

Employer of general securities representative did not waive its right to compel arbitration of dispute over promissory note executed in furtherance of the employment relationship by agreeing to have note governed by and construed in accordance with laws of New York since that provision evidenced choice of law rather than choice of forum.

— — — — —

Jeffrey L. Cohen, Wm. Lewis Spearas, Atlanta, Ga, for plaintiff.

Steve J. Davis, H. Wayne Phears, Atlanta, Ga., for defendant.

ORDER

ROBERT H. HALL, District Judge.

This action orginated in the Superior Court of Fulton County, Georgia and was removed to this court on the basis of diversity

of citizenship. Plaintiff seeks a delcaration that defendant has no right to comple arbitration and that a certain promissory note is void and unenforceable. Plaintiff also seeks to recover damages for various alleged tortious misconduct as well as punitive damages. Presently pending before this court is defendant's motion to dismiss, or, alternatively, to stay this action pending arbitration, and pliantiff's motion to stay arbitration.

FACTS

In 1982, plaintiff and defendant entered into an employment agreement as a part of his application for employment with defendant, plaintiff exceuted a document entitiled "Uniform Application for Securities Industry Registration" which sought full resitration as a general securities representative with the American Stock Exhcnage, the National Association of securities Dealers and the New York Stock Exchange. (Exhibit A to defendnat's motion). On the third page of the registration application, plaintiff states as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations which I register . . .

(*Id.* at p. 3, para. 5). The record does not indicate when this application was approved, but it was apparently approved at some point.

Rule 347 of the New York Stock Exchange, on of the organizations with which plaintiff became registered and one of the organizations with which defendant was a member[1], requires arbitration of any dispute arising out of the employment of a registered represntative with a member organization:

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[1] *See* Exhibit B to defendant's motion, p. 1.

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member orngaiztion shall be settled by arbitration at the instance of any such party in accordance with arbitration procedures prescribed elsewhere in these rules.[2]

Article VIII of the Constitution of the New York Stock Exchange provides as follows:

> See 6. Any controversy between a non-member and a member, allied member, member firm or member corporation arising out of the business of such member shall be submitted for arbitration. . .[3]

Plaintiff resigned from his employment with defendant on October 15, 1983, and a number of disputes arise between plaintiff and defendant. Shortly after learning of these disputes defendant filed a "Statement of Claim" which submitted the disputes of which it was aware to the New York Stock Exchange for arbitration. (Exhibit B to defendant's motion). Defendant also filed a "Uniform Submission Agreement" with the Exchange. (Exhibit C to defendant's motion). Approxmiately two months later, on February 9, 1984, plaintiff filed an objection to the arbitration, requesting that the arbitration be dismissed (Exhibit D to defendant's motion), and initiated the present action.

The parties have since received a letter response (dated March 5, 1984) from the New York Stock Exchange essentially stating

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[2] The Rules of New York Stock Exchange have not been filed with the court; however, plaintiff does not dispute the existence of Rule 347 or defendant's recitation of this rule.

[3] The New York Stock Exchange Constitution also has not been filed with the court, but plaintiff does not dispute its existence or defendant's recitation of it.

that the Exchange has no authority to stay the arbitration absent a court order and the arbitration proceeding would continue.

DISCUSSION

Defendant moves to dismiss this action, or, in the alternative, to stay the action pending arbitration, on the ground that the claims asserted by plaintiff are subject to arbitration under an agreement to arbitrate entered into by plaintiff and defendant. Plaintiff opposes defendant's motion and concurrently moves to stay the arbitration proceedings before the New York Stock Exchange on three gournds. First, plaintiff contends that there was no agreement made between him and defendant to submit their disputes to arbitration. Second, plaintiff argues that even if there was an agreement to arbitrate, the disputes asserted in this action do not fall within that agreement. And, finally, plaintiff maintains that defendant has wavied any right it may have to compel arbitration.

For the reasons discussed below, the court GRANTS defendant's motion to stay these proceedings pending arbitration.

A. The Federal Arbitration Act

[1] The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1947), provides that:

> [A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out such contract or transaction, or the refusal to perform the whole or any part thereof, or an ageement in writing to submit to arbitration an existing controvery arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Act further provides that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such aribtration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the story is not in default in proceeding with such arbitration.

9 U.S.C. § 3. These provisions have been held applicable in diversity actions to enforce an arbitration provision of a contract "evidencing a transaction involving commerce" despite the fact that state law is usually adopted in diversity cases. *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., Inc.*, 625 F.2d 22, 25 (5th Cir. 1980).

The employment contract in question appears to be a "contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act. An employment relationship is a "contract evidencing a transaction," *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971), and the employment relationship between plaintiff and defendant concerned securities which are transactions involving interstate commerce. *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.*, 351 F.Supp. 1367, 1370 (D.D.C.1972). Thus, the Federal Arbitration Act and the principles developed pursuant to it will control in this case.

The fact that his case was removed from state to federal court does not affect this court's mandate under 9 U.S.C. § 3; thus, if this court finds a stay of this proceeding is appropriate under § 3, it must order a stay notwithstanding the fact of removal. *Bernhardt v. Polygraphic Co. of America*, 218 F.2d 948 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956).

B. Existence of an agreement to arbitrate.

[2] Although there is an overriding federal policy favoring arbitration, arbitration is a matter of contract and a party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so. *First Citizens Municipal Corp. v. Pershing Division of Donaldson, Lufkin & Jenrette Securities Corp.*, 546 F.Supp. 884, 887 (N.D.Ga. 1982). *Also see Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1962). Thus, the first question for the court is whether there was an agreement to arbitrate between defendant and plaintiff.

[3] Defendant essentially argues that plaintiff implicitly agreed to arbitrate disputes arising between them according to the rules of the New York Stock Exhcnage when he submitted the Uniform Application for Securities Industry Registration with his application for employment with defendant. Defendant alternatively argues that it is a beneficiary to the agreement to arbitrate entered into between plaintiff and the New York Stock Exchange.

Plaintiff, on the other hand, strongly insists that he never explicitly or implicitly agreed to submit disputes arising between him and defendant to arbitration. He points to the absence of any written agreement between himself and defendant. He contends that the Uniform Application was "merely an application" and that it was a preprinted adhesion contract. As for the agreement to arbitrate between plaintiff and the New York Stock Exchange, plaintiff contends that that agreement was strictly between himself and the New York Stock Exhcange and defendant is not a beneficiary to it.

Upon carefully considering the applicable law, the court concludes that the Constitution and Rules of the New York Stock Exchange create a binding agreement to arbitrate between plaintiff and defendant. See *Muh v. Newburger, Loeb & Co., Inc.*, 540 F.2d 970, 972 (9th Cir. 1976); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir.), *cert. denied*, 406 U.S. 949,

92 S.Ct. 2045, 32 L.Ed.2d 337 (1972), *quoting Brown v. Gilligan, Will & Co.*, 287 F.Supp. 766 (S.D.N.Y. 1968); *Rust v. Dresel Firestone Inc.*, 352 F.Supp. 715, 717 (S.D.N.Y. 1972); *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.*, *supra*, 351 F.Supp. at 1370, *Cf. Tullis v. Kohlmeyer & Co.*, 551 F.2d 632 (5th Cir. 1977). The Constittuion and Rules of the New York Stock Exchange constitute the agreement between the Exchange and plaintiff as well as the agreement between the Exchange and defendant; and, by their terms, they also constitute an agreement between plaintiff and defendant. It is not dispositive that there was no express agreement to arbitrate made directly by plaintiff and plaintiff as each was no doubt aware of the binding effect of the Exchange's Constitution and Rules providing for arbitration on representatives and member firms.[4]

The court rejects plaintiff's argument that the agreement to arbitrate is invalid because it is adhesive; the arbitration rule is a reasonable exercise of the self-regulatory power vested in the Exhcnage, 15 U.S.C. § 78a *et seq.*, and is not void as adhesive. *See Rust v. Dresel Firestone Inc.*, *supra*, 352 F.Supp. at 717-18.

C. Scope of arbitration agreement.

[4] The next question presented by this action is wehther the dipsutes between plaintiff and defendant are within those disputes which are arbitrable under the arbitration agreement.

The arbitration agreement, consistng of the Exchange's Constitution and Rules, provided that "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termiantion of employement of such registered representative by and with such member organization shall be settled by arbitration . . ." (Exchange Rule 347). The clear import of this agreement is that *any* controversy

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[4] Ad an alternative to this "three-party agreement" analysis, the court finds that the agreement to arbitrate contained in the Uniform Application, as a contition precedent to plaintiff's employment with defendant, became an "integral and mutually binding part of [plaintiff's] employment arrangement with [defendant]." *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

arising out of the employment of a registered representative with a member organization is subject to arbitration.

Plaintiff's contention that its claims do not arise out of his employment with defendant is rejected. It seems evident that but for the employment relationship there would be no dispute between plaintiff and defendant. The promissory note was apparently executed in connection with plaintiff undertaking employment with defendant. The alleged tortious acts complained of are similarly inextricably intertwined with plaintiff's employment. Thus, the court finds that the dipsutes asserted in this action are arbitrable under the aribtration agreement between plaintiff and defendant.[5,6]

The court, in reaching this conclusion, is guided by the Supreme Court's recent comment that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" in light of the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

D. Waiver

[5] The final issue to be resolved is whether defendant waived its right to submit the current dipsutes to arbitration.

Plaintiff submits that defendant wavied its right to compel arbitration of the dispute over the promissory note when it agreed

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[5] Under the court's alternative analysis, (*see* footnote 4, *supra*), the agreement to arbitrate found in the Uniform Application provided for arbitration of "any dispute, claim or controversy between [plaintiff] and [defendant] . . . that is requried to be arbitrated under the rules, constitutions or by-laws of the organizations which [plaintiff] register[ed]." The disputes would be arbitrable under this agreement as well as it incorporates Rule 347 of the New York Stock Exchange.

[6] Because the court finds all of plaintiff's claims arbitrable it does not reach plaintiff's argument that the arbitrable issues are so intertwined with non-arbitrable issues that a stay of the arbitration is warranted.

that the note would "be governed by and construed in accordance with the laws of the State of New York." (See Exhibit 2 to Complaint). Plaintiff alleges further evidence of wavier in defendant's agreement that:

> If any paragraph of this Note . . . shall for any reason be *adjudged by any Court of competent jurisdiction* to be invalid or unenforceable, such judgment shall not affect, impair, or invalidate the remainder of this note . . . .

(*Id.*) (Emphasis added by plaintiff).

The court finds that defendant has not wavied its right to compel arbitration of the disputes before the court. The fact that defendant agreed to be governed by the laws of New York evidences a choice of law rather than a choice of forum. As for the provision regarding an adjudication by a court of competent jurisdiction, the court does not deem this a waiver of the right to compel arbitration, but merely a provision in the event neither party chose to arbitrate the dispute and the dispute became the subject of a law suit. There is no evidence that defendant knowingly and intentionally waived its right to arbitrate.

CONCLUSION

Finding that there was a valid arbitration agreement, that the disputes before the court are referable to arbitration under that agreement, and that defendant has not waived its right to compel aribtration, the court GRANTS defendant's motion to stay this action pending arbitration; plaintiff's motion to stay arbitration pending a trial in this case is DENIED.

NEW YORK STOCK
EXCHANGE, INC.

In The Matter of the Arbitration
Between
PAINE WEBBER JACKSON &
CURTIS INC.

CLAIMANT

VS.

THOMAS P. CULLEN

RESPONDENT

DECISION

We, the undersigned, being the arbitrator(s) selected to hear and determine a matter in controversy between the above-mentioned claimant(s) and respondent(s) set forth in a submission to arbitration signed by the claimant on November 22, 1983 and Pursuant to Article XI, Rules 600 to 634 of the Constitution and Rules of the Board of Directors of the New York Stock Exchange, Inc.

And having heard and considered the proofs of the parties, have decided and determined that in full and final settlement of the above matter, that respondent shall pay to claimant the sum of $216,932.83;

And, with regard to the counterclaim, have decided and determined that in full and and final settlement of the counterclaims, that the counterclaims be and hereby are in all respects dismissed;

That the costs, $2,200.00, which are payable to the New York Stock Exchange, Inc., be and hereby are assessed against both claimant and respondent equally, each party to pay $1,100.

ATLANTA, GA
JUNE 24, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS P. CULLEN

VS.

PAINE, WEBBER, JACKSON & CURTIS, INC.

CIVIL NO. 1:84-cv-502-ODE

ORDER

This action is before the court on Defendant's motion for confirmation of an arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. Plaintiff has filed a cross motion to vacate the same arbitration decision.

This action began in the Superior Court of Fulton County and was subsequently removed to federal court. Pursuant to a motion by Defendant, the case was administratively closed while the parties sent their dispute to arbitration in accordance with an arbitration agreement executed prior to the controversy which generated this lawsuit. On June 23 and 24, 1987, the parites arbitrated their dispute before a panel of arbitrators of the New York Stock Exchange. Following this hearing, the arbitration panel issued a written decision. The decision was issued on June 24, 1987. On November 20, 1987, Defendant filed a timely motion to reopen the case and to confirm that arbitration decision. On December 9, 1987, four months after the arbitrators' decision was issued, Plaintiff responded to that motion by serving a cross motion to vacate the award.

Under § 12 of the Arbitration Act, an aggrieved party has three months to file a motion to vacate an arbitration decision. That code section provides: "Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." Plaintiff's instant motion to vacate the arbitration

decision rendered in his case was filed well outside that statutorily imposed limitation. Plaintiff argues that he should be allowed to raise the issues alleged in his motion to vacate because they constitute affirmative defenses to Defendant's motion to confirm the award. He also argues that the statutory time limit should be waived because his attorney was duly diligent in filing the cross motion to vacate.

Plaintiff cites two cases in support of his argument: *Paul Allison v. Minnikin Storage of Omaha, Inc.*, 452 F.Supp. 573 (D.C. Neb. 1978), and *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, 357 F.Supp. 521, 523 (S.D.N.Y. 1973), both cases held that a party may bring a motion to vacate after the three month limit imposed by 12 of the Arbitration Act if the motion to vacate is brought in response to a motion to confirm the award. However, the *Riko* case was subsequently overruled by the Second Circuit in *Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984). In that case, the Second Circuit held that a defendant's failure to move to vacate an arbitration award within the three month time provided precludes him from later seeking the same relief when a motion to confirm the award. The Court reasoned:

> An examination of the underlying purposes of the arbitration mechanism amply demonstrates the sound policies that support our conclusion. First, the confirmation of an arbitration award is a summary proceeding that merely makes what is already final arbitration award a judgment of the court. [citation omitted]. The award need not actually be confirmed by a court to be valid . . .
>
> Second, parties choose to arbitrate because they want quick and final resolution of their disputes. The role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award. [citation omitted]. Thus, when a party to an arbitration believes he has been prejudiced in the proceedings by behavior that the Act condemns he must bring a motion to vacate within the allotted

> time. When the three month limitations period has run without vacation of the arbitration award, the successful party has a right to assume the award is valid and untainted, and to obtain its confirmation in a summary proceeding.

Id. at 176-77.

The only other Circuit Court of Appeals to address this issue came to the same conclusion. In *Taylor v. Nelson*, 788 F.2d 220,225 (4th Cir. 1986), the Fourth Circuit adopted the rule established by the Second Circuit in *Florasynth*, holding that an attempt to vacate an arbitration award could not be made beyond the three-month limit even in opposition to a motion to confirm. Both the Fourth Circuit and the Second Circuit noted that this rule regarding the Federal Arbitration Act is consistent with decisions concerning arbitration awards rendered pursuant to the Labor Management Relations Act, 29 U.S.C. § 185. *See e.g., Electrical Workers Local 969 v. Babcock and Wilcox*, 826 F.2d 962 (10th Cir. 1987) (courts have "uniformly held" that a defendant's failure to move to vacate an arbitration award within the proscribed time period precludes it from seeking affirmative relief in a subsequent action to enforce the award); *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983); *Chauffeurs Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Company*, 628 F.2d 1023, 1025-27 (7th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

In the absence of any contrary case law from this Circuit, the court will follow the rule espoused in *Taylor* and *Florasynth*; a party may not move to vacate an arbitration award more than three months after the date that the arbitration panel issued its award. In this case, such a motion should have been filed by September 24, 1987. It was filed more than two months late.

Plaintiff argues, alternatively, that the court should graft a "due diligence" exception onto the statutory time limit. Although no court has directly addressed whether such an exception is valide, dicta in both the *Taylor* and *Florasynth* decisions strongly

indicate that such an exception should not be available.[1] Ultimately, this court need not decide this issue either, because assuming arguendo that such an exception exists, it has not been proven here. The only explanation given by counsel for Plaintiff for not filing a motion to vacate within the three month deadline was that "good faith settlement negotiations" were proceeding. This is insufficient. Plaintiff offers no support for the novel proposition that a pending motion to vacate an unfavorable arbitration award would somehow jeopardize settlement negotiations. There is no reason why a party should not file a motion to vacate within the statutory time frame in order to protect its rights in the event that the settlement negotiations fall through. Accordingly, the court finds that Plaintiff is now time-barred from raising as affirmative defenses the issues he presents in his untimely motion to vacate the arbitration award.

Defendant's motion to reopen the case and confirm the arbitration award is GRANTED. Plaintiff's cross motion to vacate is DENIED. The Clerk is DIRECTED to enter final judgment in favor of Defendant in the amount of $216,932.83. Each party is to bear its own costs.

SO ORDERED, this 5th day of April, 1988.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

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[1] In *Taylor* the Court stated, "Due diligence and tolling exceptions do not appear on the face of § 12... The existence of any such exceptions to § 12 is questionable, for they are not implicit in the language of the statute, and cannot be described as common-law exceptions... We do not consider, however, whether due diligence or tolling rules are proper exceptions to the limitations proscribed by the Federal Arbitration Act, for we conclude that Taylor did not, in any event, act with due diligence..." *Taylor*, 788 F.2d at 225. In *Florasynth* the Court stated, "there is not common law exception to the three month limitations period on the motion to vacate." *Florasynth*, 750 F.2d at 175.

Thomas P. CULLEN,

Plaintiff-Appellant,

v.

PLAINTIFF, WEBBER, JACKSON & CURTIS, INC.,

Defendant-Appellee.

NO. 88-8325

Non-Argument Calendar.

United States Court of Appeals
Eleventh Circuit.

Jan. 17, 1989.

Payee moved to confirm arbitration award. The United States District Court for the Northern District of Georgia, No. 1:84-cv-502-ODE, Orinda D. Evans, J., confirmed award and denied motion to vacate it. Payee appealed. The Court of Appeals held that: (1) failure to move to vacate arbitral award within three-month limitation period barred that maker from raising alleged invalidity of award as defense to confirmation, and (2) maker failed to establish that negotiations with payee prevented timely filing of motion to vacate arbitration award.

Affirmed.

1. Arbitration 77(2)

Party's failure to move to vacate arbitral award within three-month limiation period barred that party from rasing alleged invalidity of award as defense to confirmation. 9 U.S.C.A. §§ 9, 12.

2. Arbitration 77(2)

Plaintiff failed to establish that negotiations with defendant prevented timely filing of motin to vacate arbitration award or

that defendant would have ceased to negotiate if plaintiff had moved to vacate award; allowing three months to slip away simply for reason that settlement negotiations were underway fell short of due diligence. 9 U.S.C.A. §§ 10, 12.

3. Federal Civil Procedure

Plaintiff's claims that time-barred claims asserted in motion to vacate arbitration award were defenses to confirmation of award and that failure to file timely motion to vacate should have been forgiven were not frivolous and did not justify imposition of sanctions on appeal. 9 U.S.C.A. §§ 9, 10, 12; F.R.A.P. Rule 38, 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

This is an appeal from an order of the United States District Court for the Northern District of Georgia (1) granting the motion of appellee, Paine, Webber, Jackson & Curtis, Inc. ("PaineWebber") to confirm an arbitral award procured by PaineWebber against appellant, Thomas P. Cullen, and (2) entering final judgment on the award. Finding no error in the judgment of the district court, we affirm.

I.

Appellant, a former broker-dealer of PaineWebber, sued appellee in the Superior Court of Fulton County, Georgia, seeking compensatory and punitive damages for allegedly tortious conduct of PaineWebber and for a declaration that a certain promissory note executed by Cullen in favor of PaineWebber is void. PaineWebber removed the action to the district court and, pursuant to section 3 of the United States Arbitration Act

(USAA), 9 U.S.C. § 3, moved therein to stay the action pending arbitration of the dispute. The district court granted the motion and stayed further proceedings pending arbitration before an arbitral panel of the new York Stock Exchange, Inc. *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 587 F.Supp. 1520 (N.D.Ga. 1984).

On June 24, 1987, following a two-day hearing, the NYSE arbitrators awarded PaineWebber $216,932.83 on the promissory note and found Cullen's tort claims meritless. On November 20, 1987, PaineWebber, pursuant to section 9 of the USAA, § 9 U.S.C. § 9, moved the district court to confirm the arbitral award.[1] On December 9, 1987, appellant filed an opposition to PaineWebber's motion to confirm and a cross-motion to vacate the award under section 10 of the USAA, 9 U.S.C. § 10.[2]

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[1] Section 9 of the USAA provides in part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified inthe agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . .

9 U.S.C.A. § 9 (West 1970).

[2] Section 10 of the USAA provides:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

(Footnote continued)

The district court denied Cullen's section 10 motion on the ground that it was time barred by the three-month limitation period of section 12 of the USAA, 9 U.S.C. § 12.[3] In so doing, the court rejected Cullen's argument that section 12's limitation period does not apply to motions to vacate filed in response to section 9 motions and appellant's argument that his failrue to move to vacate the award within three months should be forgiven under a judicially-fashioned, "due-diligence" exception to the language of section 12. The district court also declined to consider Cullen's arguments as "affirmative defenses" in opposition to PaineWebber's motion to confirm. The court held that Cullen was "time-barred from" raising as affirmative defenses the issues he present[ed] in his untimely motion to vacate the arbitration award. "Accordingly, the court granted PaineWebber's motion to confirm and entered final judgment against Cullen in the amount of $216,932.83."

II.

A.

[1] The first of Cullen's two arguments on appeal is that, because his challenges to the validity of the arbitral award were

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pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C.A. § 10 (West 1970).

[3] Section 12 of the USAA provides in part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. . . .

9 U.S.C.A. § 12 (West 1970).

made as "affirmative defenses" in a memorandum in opposition to PaineWebber's section 9 motion to confirm the award as well as in his own section 10 motion to vacate, the district court erred by failing to consider those challenges and by confirming the award. This argument concedes *arguendo* that Cullen's section 10 motion was time barred by section 12 but maintains that section 12 does not reach affirmative defenses raised in opposition to section 9 motions to confirm.

Although we have never considered this issue, we are not without guidance. The Second Circuit has squarely addressed the question and emphatically held that, under the USAA, a party's "failure to move to vacate the award within the three month time provided [by section 12] precludes him from later seeking that relief when a motion is made to confirm the award." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984).

At least two other Courts of Appeals have followed the Second Circuit. *Professional Administrators Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642 (6th Cir. 1987) (citing, *inter alia*, *Florasynth, supra*); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir.) (same), *reh'g denied*, (1986). Also, the Sixth Circuit reached the same conclusion in an action to confirm brought under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, in which the court borrowed section 12's three-month statute of limitations. *Occidental Chem. Corp. V. International Chem. Workers Union*, 853 F.2d 1310, 1317 (6th Cir. 1988). Other Courts of Appeals have reached the same conclusion when borrowing state analogues to section 12 in actions under section 301 of the LMRA. *International Bro. of Elec. Workers, Local Union No. 969 v. Babcock & Wilcox*, 826 F.2d 962, 964-66 (10th Cir. 1987) (Colorado statute); *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Co. v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983) (California statute); *Sheet Metal Workers' Int'l Ass'n, Local No. 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 483 (9th Cir. 1983) (same); *Service Employees Int'l Union, Local No. 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404, 412 (3d Cir. 1982) (Pensylvania statute); *Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co., Inc.*, 628 F.2d

1023, 1025 (7th Cir. 1980) (Indiana statute), *cert. denied*, 449 U.S. 1125, 101 S.Ct. 942, 67 L.Ed.2d 111 (1981).

We adopt the reasoning of our sister courts and hold that the failure of a party to move to vacate an arbitral award within the three-month limitations period prescribed by section 12 of the United States Arbitration Act bars him from raising the alleged invalidity of the award as a defense in opposition to a motion brought under section 9 of the USAA to confirm the award. Thus, the district court properly rejected appellant's affirmative defenses as time barred.

Moreover, as the courts have noted, "[a] confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the [United States] Arbitration Act." *Taylor*, 788 F.2d at 225; *see also Kopper-Glo*, 819 F.2d at 642 ("[A]n action to confirm the award should be a summary proceeding, not a proceeding in which the defendant seeks affirmative relief."); *Florasynth*, 750 F.2d at 177 ("When the three month limitations period has run without vacation of the arbitration award, the successful party has a right to . . . obtain confirmation in a summary proceeding."). Thus, not only were Cullen's affirmative defenses time barred; they were irrelevant to the issues before the district court on consideration of appellee's motion to confirm the award.

B.

[2] Cullen's second argument on appeal is that the district court erred in holding that his motion to vacate was time barred by section 12. He asserts that his failure to file a motion to vacate within three months should be forgiven under a judicially-fashioned, due-diligence exception to the language of section 12, because, throughout the first three months after the award was issued, he and PaineWebber were engaged in settlement negotiation. He argues that his prosection of those negotiations constituted due diligence in pursuit of his claim that the award was invalid as issued, and he concludes that his diligence required the district court to grant him an exception to section 12's three-month limitations period.

We are unpersuaded. Although some courts have considered the possibility that a due-diligence exception to section 12 might be granted in some circumstances, appellant cites no case in which such an exception has been granted.[4] We need consider neither the contours nor the existence of such an exception, for, even if an exception might be proper in some circumstances, Cullen has alleged insufficient fact to demonstrate the he was prevented by the pendence of negotiations from filing a timely section 10 motion of the PaineWebber would have ceased to negotiate if Cullen had moved to vacate the award. It is clear that allowing section 12's three-month window of opportunity to slip away simply because settlement negotiations, no matter how promising, are under way falls considerably short of due diligence.

[3] Accordingly, the judgment of the district court is AFFIRMED.[5]

9 U.S.C.A. § 9: AWARD OF ARBITRATORS CONFIRMATION; JURISDICTION; PROCEDURE

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must granted such an order unless the award is vacated, modified, or corrected as

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[4] In *Taylor, supra*, cited by appellant as having "noted" the existence of a due-diligence exception, the Fourth Circuit emphatically "d[id] not consider . . . whether due diligence . . . [is a] proper exception[] to the limitations period prescribed by the [United States] Arbitration Act, for . . . [the party in that case] did not, in any event, act with due diligence." 788 F.2d at 225.

[5] Although we find appellant's arguments meritless and affirm the judgment of the district court, the appeal presents an issued of first impression in this circuit and is not so baseless as to be frivolous. We therefore decline appellee's invitation to impose sanctions under Fed.R. App.P. 38.

prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. 9 U.S.C.A. § 9 (West 1970).

July 30, 1947, c.392, 61 Stat. 672.

9 U.S.C.A. § 10: SAME; VACATION; GROUNDS; REHEARING

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacting the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. 9 U.S.C.A. § 10 (West 1970).

July 30, 1947, c.392, 61 Stat. 672.

9 U.S.C.A. § 11: SAME; MODIFICATION OR CORRECTION; GROUNDS; ORDER

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. 9 U.S.C.A. § 11 (West 1970).

July 30, 1947, c.392, 61 Stat. 673.

9 U.S.C.A. § 12: NOTICE OF MOTION TO VACATE OR MODIFY; SERVICE; STAY OR PROCEEDINGS

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion

in an action in the same court. If the adverse party shall be nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. 9 U.S.C.A. § 12 (West 1970).

July 30, 1947, c.392, 61 Stat. 673.

Supreme Court, U.S.
FILED
MAY 17, 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1699

In The

Supreme Court of the United States

October Term, 1988

THOMAS P. CULLEN,

Petitioner,

vs.

PAINE, WEBBER, JACKSON & CURTIS, INC.
n/k/a PAINEWEBBER INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in ruling that Thomas P. Cullen ("Cullen") could not oppose the motion of Paine, Webber, Jackson & Curtis, Inc. ("PaineWebber") to Confirm Arbitration Decision because Cullen filed his Opposition and Cross-Motion to Vacate well beyond the three-month time period that is expressly provided by Section 12 of the Federal Arbitration Act.

2. Whether the Eleventh Circuit Court of Appeals erred in ruling that Cullen's pursuit of settlement negotiations beyond the three-month time period did not operate as a "due diligence" exception to Section 12 because Cullen never demonstrated that he was precluded from filing a motion to vacate within the three-month time period.

PARTIES

Thomas P. Cullen

Paine, Webber, Jackson & Curtis, Inc.

PaineWebber Incorporated

PaineWebber Group, Inc.

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No. 88-1699

In The

Supreme Court of the United States

October Term, 1988

THOMAS P. CULLEN,

Petitioner,

vs.

PAINE, WEBBER, JACKSON & CURTIS, INC.
n/k/a PAINEWEBBER INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS BELOW

The opinion of the Eleventh Circuit Court of Appeals (P.A.-16-22) is reported at 863 F.2d 851. The opinion of the District Court (P.A.-12-15) is unreported but may be obtained at the United States District Court, Northern District of Georgia, Atlanta Division, Civil No. 1:84-cv-502-ODE entered on April 7, 1988.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 17, 1989. The Petition for Writ of Certiorari was filed on April 17, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 9 in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 10:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 12 in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

STATEMENT OF THE CASE

Petitioner Thomas P. Cullen ("Cullen") is a former employee and investment executive of Respondent Paine, Webber, Jackson & Curtis, Inc. ("PaineWebber"). In February, 1984, Cullen initiated this action in the Superior Court of Fulton County, State of Georgia and alleged that PaineWebber had engaged in certain tortious conduct and that a promissory note between them was void (P.A.-17). The suit was subsequently removed to the United States District Court for the Northern District of Georgia, Atlanta Division (the "District Court") and was stayed pending arbitration of all disputes between the parties. (P.A.-2-3; P.A.-10).

On June 23 and 24, 1987, the Parties arbitrated their respective claims before an agreed-upon panel of arbitrators of the New York Stock Exchange, Inc. (P.A.-12). Following the two-day hearing, the Arbitrators issued a written decision on June 24, 1987 awarding PaineWebber $216,932.83. (P.A.-11). PaineWebber filed a timely motion to reopen and to confirm the arbitration decision in the District Court on November 20, 1987 pursuant to Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9. (P.A.-12). On December 9, 1987, over five months after the Arbitrators had issued their award against Cullen, Cullen responded to that motion by serving a cross-motion to vacate pursuant to Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10. (P.A.-12).

In an Order dated April 5, 1988, the District Court denied Cullen's Section 10 motion on the ground that it was time barred by the three-month limitation period of Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12. (P.A.-15). The District Court also rejected Cullen's argument that his failure to move to vacate within the statutory three-month period should be forgiven under what he termed as a "due diligence" exception to Section 12. (P.A.-14-15). Accordingly, the District Court granted PaineWebber's motion to confirm and entered final judgment against Cullen in the amount of $216,932.83. (P.A.-15).

The Eleventh Circuit Court of Appeals affirmed. (P.A.-22). Like the other Courts of Appeals that have addressed the issue, the Eleventh Circuit ruled that the failure of a party to move to vacate an arbitration award within the three-month limitation period of Section 12 precludes him from contending that the award is invalid

even if it is asserted as a defense to a motion to confirm. (P.A.-21). The Eleventh Circuit also was "unpersuaded" by Cullen's "due diligence" argument because he cited no case in which such an exception was the basis for overturning an untimely motion to vacate and, even if it was a recognized exception, Cullen had alleged insufficient facts to show that he was prevented from filing a timely motion to vacate. (P.A.-22). In summary, the Eleventh Circuit found Cullen's arguments to be "meritless" and affirmed the judgment of the District Court. (P.A.-22 n. 5).

SUMMARY OF THE ARGUMENT

This Court should not grant certiorari because the issues involved have been expressly resolved by Congress in Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12, and uniformly confirmed by all of the Courts of Appeals to address those issues. Section 12 provides an absolute bar to any attempt to vacate an arbitration decision beyond three months from the date that the Arbitrators' decision was filed or delivered. The strict mandate of Section 12 applies to an untimely motion to vacate and late opposition to motions to confirm. Petitioner's failure to meet a clear but generous filing deadline is not the type of matter that should be before this Court.

Moreover, despite Petitioner's arguments to the contrary, there is no "due diligence" exception to Section 12's three-month time period. No Court of Appeals has adopted one, and this Court should not establish such a precedent on behalf of someone who failed to meet a clear deadline established by Congress.

Finally, even if such an exception exists, Petitioner has failed to satisfy it. The few courts which have even considered the remote possibility of a due diligence exception indicate that even if such an exception is proper, it can only be met through a showing of best efforts to file, excusable neglect and absence of prejudice to the opposing party. In the present case, Petitioner has failed to make such a showing. Accordingly, this Court should deny the Petition for Writ of Certiorari.

ARGUMENT

Petitioner asks this Court to address a question that has received the same answer from all of the Courts of Appeals to have reached it[1] and is expressly mandated by Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12. This is not a case involving an important federal question, implicating far-reaching national concerns which might necessitate consideration by this Court. Rather, this is simply a case where Petitioner failed to meet a clearly

[1] Cullen specifically claims that the decision of the Eleventh Circuit below "is in conflict with another appellate court case . . . ," (P.-3), but does not cite a single case in support of this argument. Similarly, it is absolute sophistry for Cullen to claim that the Eleventh Circuit decision was based on a "changed interpretation" of Section 12 (P. 7, 8) when he has presented no authority from a single Court of Appeals demonstrating an interpretation that was different from that of the Eleventh Circuit.

established and generous filing deadline. Accordingly, further review is unwarranted.[2]

A. The Federal Courts Of Appeals Have Uniformly Held That The Expiration Of The Three-month Period Operates As An Absolute Bar

Section 12 of the Federal Arbitration Act provides an aggrieved party a strict time limit of three months within which to file a motion to vacate. Section 12 mandates: Notice of a motion to vacate . . . must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

Without exception, the federal Courts of Appeals have ruled that the expiration of the three-month period absolutely precludes any attempt to vacate an arbitration

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[2] Significantly, nowhere in the Petition for Writ of Certiorari does Cullen even attempt to argue that the instant case satisfies the character of reasons in favor of granting certiorari as stated in Rule 17.1 of the Rules of this Court. In fact, Petitioner does not even cite one case from this Court in which certiorari was granted under similar circumstances. *See, e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 336 (1982) (granting certiorari because the undisputed facts disclosed a violation of a statute); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 470 (1982) (granting certiorari because of the unusually broad and novel view adopted by a Court of Appeals); *Detroit Edison Co. v. National Labor Relations Board,* 440 U.S. 301, 304 (1979) (granting certiorari to consider an important question of federal law); *Marks v. United States,* 430 U.S. 188, 189 (1977) (granting certiorari to resolve a conflict in the Circuits).

decision.[3] The three-month statute of limitations of Section 12 also bars a party from opposing a motion to confirm an arbitration award because such opposition is viewed as tantamount to a motion to vacate.[4] The rationale for the three-month rule under Section 12 is the rapid resolution of arbitrated disputes. *See American Postal Workers Union, AFL-CIO v. United States Postal Service*, 823 F.2d 466, 476 (11th Cir. 1987). As the Sixth Circuit Court of Appeals has emphasized,

> [a]n action to vacate an award challenges the underlying *validity* of the arbitration proceeding and award. The policy of quickly resolving disputes subject to arbitration, . . . favors a short limitations period for such challenges. Occasionally, in the implementation process, however, parties to an arbitration may be willing or find it necessary to readjust the terms of the arbitration award before seeking its

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[3] *See, e.g., Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310, 1316, 1317 (6th Cir. 1988); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984); *Brotherhood of Teamsters & Auto Truck Drivers, Local Number 70 of Alameda County v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983); *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 600 (8th Cir. 1981). *See also International Brotherhood of Electrical Workers, Local Union Number 969 v. Babcock & Wilcox*, 826 F.2d 962, 965-66 (10th Cir. 1987); *Service Employees International Union, Local Number 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404, 412 (3d Cir. 1982); *Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union Number 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1025 (7th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

[4] *Occidental*, 853 F.2d at 1317; *Babcock & Wilcox*, 826 F.2d at 966; *Taylor*, 788 F.2d at 225; *Florasynth*, 750 F.2d at 175; *Celotex*, 708 F.2d at 490; *Office Center Services*, 670 F.2d at 412.

> confirmation. Recognizing the realities of the marketplace, [the United States Congress] may with good reason have allowed a longer period of time for the confirmation of a concededly valid award without forcing the parties to resort to judicial involvement.

Occidental Chemical Corp. v. International Chemical Workers Union, 853 F.2d 1310, 1314 (6th Cir. 1988) (quoting *Service Employees International Union, Local Number 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404, 412 (3d Cir. 1982)).

In the present case, Cullen did not move to vacate and raise his affirmative defenses to PaineWebber's motion to confirm until well over five months after the Arbitrators issued their award. (P.A.-14).[5] Under the strict mandate of Section 12, and the universal holdings of the Courts of Appeals, Cullen was late in raising his objections and lost any right to move to vacate the arbitration award.[6]

Despite the clear mandate of Section 12 and the uniform decisions by the Circuit Courts of Appeals, Cullen still contends that his motion was timely filed based upon

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[5] Although Section 12 states that the three-month period does not begin to run until the arbitration award is "filed" or "delivered," courts interpret that the three-month time period commences when the arbitrators issue their award. *See, e.g., Florasynth*, 750 F.2d at 177.

[6] Cullen improperly argues that the arbitration award should have been vacated supposedly because "[t]he arbitrators' conduct showed partiality and constituted misconduct which prejudiced Mr. Cullen's rights to a fair arbitration . . . ." (P.-9). The Court is respectfully urged not to consider these arguments because neither the District Court nor the Eleventh Circuit below made any finding of fact or conclusion of law on these points.

two district court opinions, *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973) and *Paul Allison, Inc. v. Minikin Storage of Omaha, Inc.*, 452 F. Supp. 573 (D. Neb. 1978). Of course, even if these decisions were persuasive, they do not create a conflict among the Circuit Courts of Appeals which would warrant this Court to consider granting certiorari. *See, e.g., Marks v. United States*, 430 U.S. 188, 189 (1977). Nevertheless, the courts in *Riko* and *Paul Allison* incorrectly arrived at their conclusions because they misconstrued a decision of the Second Circuit Court of Appeals which was essential to their respective holdings, *The Hartbridge*, 57 F.2d 672 (2d Cir. 1932).[7] In fact, the Second Circuit Court of Appeals in *Florasynth* overruled *Riko* and held that a party who fails to move to vacate within the three-month period loses the right to oppose an arbitration decision. 750 F.2d at 174-75. In light of the overwhelming rejection of these two district court decisions and Cullen's lack of compelling authority, Cullen has asserted no grounds whatsoever that should convince the Court to grant certiorari.[8]

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[7] Other courts have also underscored the misinterpretation of *The Hartbridge* by the *Riko* and *Paul Allison* courts. *See, e.g., Office Center Services*, 670 F.2d at 411; *Jefferson Trucking*, 628 F.2d at 1026.

[8] Cullen also cites M. Domke, Commercial Arbitration § 35:01 (1984), in support of his argument that his motion to vacate was timely. Commercial Arbitration, however, is also unpersuasive because it relies only on *Paul Allison* in drawing its conclusion. *See* M. Domke, Commercial Arbitration § 35:01 n. 2.

B. No Federal Court of Appeals Has Adopted A "Due Diligence" Exception To A Timely Motion To Vacate Under Section 12.

Section 12 of the Federal Arbitration Act does not provide any exception whatsoever to the three-month time limitation. *See* 9 U.S.C. § 12. Yet, Cullen, once again, misinterprets the law and argues that "courts may yet recognize a due diligence exception . . . ." (P.-10) (citing *Taylor*, 788 F.2d at 225). In fact, like the Eleventh Circuit below, the Fourth Circuit Court of Appeals in *Taylor* questioned the existence of an exception to Section 12 because it is "not implicit in the language of the statute, and cannot be described as [a] common-law exception[ ] because there was no common-law analogue to enforcement of an arbitration award." 788 F.2d at 225.

Moreover, like the aggrieved party to the arbitration in *Taylor*, Cullen's actions should not satisfy any such "due diligence" exception. The few courts which have even considered the possibility of a due diligence exception suggest that a due diligence defense will not be successful absent a showing of best efforts to file, excusable neglect and absence of prejudice to the opposing party. *See, e.g., Taylor*, 788 F.2d at 225; *Piccolo*, 641 F.2d at 601. Cullen has not made such a showing. There is no reason why Cullen could not have filed his motion to vacate within the statutory time frame in order to protect his rights in the event that his settlement negotiations fell through. (P.A.-22). Even Cullen does not argue that he could not have filed his motion earlier. Moreover, PaineWebber would have been prejudiced by the delay because it had relied on the fact that the dispute had finally ended. Accordingly, the Eleventh Circuit Court of

Appeals correctly rejected Cullen's unfounded claim that he met a so-called "due diligence" exception. (*Id.*).[9]

CONCLUSION

For the foregoing reasons, Respondent PaineWebber respectfully requests the Court to deny Cullen's Petition for Writ of Certiorari.

Respectfully submitted,

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[9] Cullen spuriously contends that this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), will somehow open the "floodgates to dispute resolution through arbitration thereby necessitating guidance on the duties of arbitrators and the various interpretations of the section 12 statute of limitations." (P.-11). As this Court undoubtedly is aware, to follow the path as argued by Cullen would be tantamount to this Court "rewriting" the Federal Arbitration Act and impermissibly invading the province of Congress. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978); *see also Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2242 (1988).